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No 01-648

IN THE
Supreme Court of the United States

WAYNE AINSWORTH, et al.,
Petitioners,

v.

PHILIP STANLEY, COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

PHILIP STANLEY, COMMISSIONER,
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RESTATED QUESTION PRESENTED

Whether the New Hampshire Department of Corrections' policy governing admission and participation in the Sexual Offender Program (SOP), which requires inmates to give open and candid responses to inquiries about their prior offending behavior, violates the Fifth Amendment by compelling inmates to incriminate themselves in that (a) inmates may be transferred to less-desirable housing if they fail to participate in the program and (b) inmates face a significantly lower likelihood of being paroled if they fail to participate in the program.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari (the "Petition") seeking review of the decision of the United States Court of Appeals for the First Circuit in *Ainsworth v. Risley*, 224 F.3d 209 (1st Cir. 2001).

STATEMENT OF THE CASE

1. *Supplemental Facts Regarding the Sexual Offender Program*

The Sexual Offender Program (SOP) is an intensive therapeutic treatment program offered by the New Hampshire Department of Corrections (DOC) to assist inmates who have been convicted of sexual offenses to better understand and control their thoughts, feelings and behavior. App. 2.[1] The goal of the program is to "ensure community safety and protection" by preventing recidivism. App. 2. The SOP has the capacity to provide treatment for approximately 60 inmates per year, out of the approximately 650 sex offenders currently incarcerated at the New Hampshire State Prison. App. 2.

Inmates are not required to enroll in the SOP; rather it is offered as a program which they may choose to enter. App. 5, 19. Because space in the program is limited, inmates must apply in order to be admitted to the SOP. App. 3. Applicants are placed on a waiting list, and at a later date are evaluated in

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[1] "App." denotes a reference to the appendix to the Petition for Writ of Certiorari.

order to assess their eligibility for the program. App. 3. One of the important criteria which the program directors rely upon in determining eligibility is whether the inmate "appears open and honest, recognizes he has a serious problem, and is committed to changing his behavior." App. 3. This criteria is based upon the treating professionals' belief that effective treatment cannot begin until the offender recognizes his past misconduct. App. 3.

Inmates who are accepted by the SOP must sign a "treatment contract." App. 3. The contract requires that inmates agree to be completely "open and honest" about their prior offending behavior and to discuss in detail their prior sexual history. App. 3. The contract also contains a waiver of confidentiality, whereby the inmate agrees that information divulged during the SOP program can be reported to law enforcement officials. App. 3. The contract contains no requirement, however, that inmates waive their Fifth Amendment right against self-incrimination.

2. *Petitioners' Claims*

Petitioners claim that the State's policies regarding participation in the SOP violate their Fifth Amendment rights against self-incrimination in that the State is compelling them to enroll in the SOP and incriminate themselves. They point to two sources of compulsion: (i) the fact that sexual offenders who do not complete the SOP are not granted parole, and (ii) the fact that inmates who do not participate in the SOP are transferred to less desirable medium-custody housing.

The New Hampshire Parole Board is an independent state board, which is not under the control of the DOC. N.H. RSA

651-A:3. The Parole Board has the discretion to release an inmate on parole once he has completed his minimum sentence, so long as the Board determines that there is a "reasonable probability that [the inmate] will remain at liberty without violating the law and will conduct himself as a good citizen." N.H. RSA 651-A:6 There is no blanket policy or rule which prohibits untreated sexual offenders from being paroled and, in fact, a small number of sexual offenders are paroled each year despite the fact that they do not complete the SOP. App. 34. However, most sex offenders who apply for parole having failed to complete the SOP are denied parole. App. 5.

In an effort to encourage inmates to participate in their own rehabilitation, prison officials have implemented a program of incentives through which the most-desirable housing assignments are reserved for those inmates who meet certain behavioral goals. App. 28. In the NHSP there are several different units which house medium-custody inmates. One of them, South Unit, is considered to be a highly desirable housing unit. App. 27. Hancock Unit, by contrast, is considered less-desirable.[2] In an effort to encourage inmates to take part in prison programming, inmates who fail to take part in the SOP are generally transferred from South Unit to Hancock Unit in order to make room in South Unit for other inmates who will be actively participating in their rehabilitation programs. App. 28.

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[2] Both units house primarily medium-custody inmates. The differences between the two units concern their respective amenities. South has two-man cells, 24-man pods, extensive outdoor privileges, and houses mainly sex offenders. App. 5. Hancock has eight-man cells, 96-man pods, only one hour of outdoor access, and houses mainly drug and violent offenders. App. 5.

REASONS FOR NOT GRANTING THE WRIT

A. The First Circuit's Opinion Does Not Conflict With the Tenth Circuit's Ruling in *Lile v. McKune*.

The Petitioners incorrectly claim that the First Circuit's opinion conflicts with the Tenth Circuit's decision in *Lile v. McKune*, 224 F.3d 1175 (10th Cir. 2000) *certiorari granted by McKune v. Lile*, 121 S.Ct. 1955, 69 U.S.L.W. 3506, 3719 (May 14, 2001). A careful reading of the two cases reveals that there is no actual conflict between the decisions.[3] The two Courts applied very similar analytical approaches in deciding the issues presented, with both adopting versions of the balancing test derived from *Turner v. Safley*, 482 U.S. 78 (1987), in order to determine whether the prison policies violated the Plaintiffs' Fifth Amendment rights. There is nothing in the opinions which suggests that the Tenth Circuit would have decided *Ainsworth v. Risley* differently than the First Circuit in fact did. Rather, the differing outcomes in the two cases stem from the vastly different facts presented in each.

Under Kansas' prison regulations, inmates who fail to take part in the Sexual Abuse Treatment Program (SATP) have their custody level reduced from Level III to Level I. *Lile v. McKune*, 224 F.3d at 1181. The result is that the in-

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[3] The Petitioners have mischaracterized the Tenth Circuit's decision in *Lile v. McKune*, describing the relevant issue in that case as whether an "adverse housing transfer is sufficiently punitive to be 'compulsion'". Petition for Certiorari at 7. This description fails to capture the essence of the Tenth Circuit's ruling. It was not the housing transfer *per se* which was found to be coercive in *Lile v. McKune*. It was the entire collection of adverse consequences taken together which the Tenth Circuit determined to be unconstitutionally coercive.

mate is automatically transferred from a medium security facility into a maximum security unit. *Id.* This transfer results in the loss of many privileges, including personal television, prison activities, gym and yard time, reduction in spending allowed in the canteen per pay period, reduction in pay, reduction in the amount of property allowed, and restricted visiting privileges. *Lile v. McKune*, 224 F.3d at 1181. The consequences flowing from the failure to complete the SATP in Kansas are the same as those which would result from the filing of felony charges against the inmate, or for serious disciplinary offenses such as theft, riot, arson and possession of contraband. *Lile v. McKune*, 24 F.Supp. 2d 1152, 1155 (D.Kan. 1998).

The facts present in the instant case are different in several significant respects. First, inmates in New Hampshire who refuse to enroll in the SOP face much less severe consequences – namely the transfer from the "premier" medium-custody housing unit to a less-desirable medium custody cell block. However, except for being moved to less-pleasant medium-custody housing, the inmates who refuse to enter the SOP do not suffer any additional loss of privileges. Their custody level is not changed, and they are not treated any differently from any of the other medium-custody inmates who happen to be housed in Hancock Unit.

Second, unlike the situation in Kansas, the transfer from South to Hancock Unit in the New Hampshire State Prison does not follow automatically and unavoidably from the failure to take the SOP. There is no statute or regulation which requires such transfers. Rather, the evidence before the Court is that prison officials use housing assignments as a way of encouraging inmates to act in particular ways. App. 28. The transfer to

South Unit is a benefit, which the prison officials confer on inmates who earn it, either by having a clean disciplinary record, or because they participate in treatment programs like the SOP. *Id.*

Given the particular facts present in New Hampshire, the First Circuit concluded that the quality-of-life difference arising from the change in housing assignments was not a severe enough consequence to rise to the level of compulsion. App. 28. As the Court's decision does not conflict with the Tenth Circuit's decision in *Lile*, the Court should deny the Petition for Writ of Certiorari.

B. The First Circuit Properly Held That the Plaintiffs Had Failed to Establish a Fifth Amendment Violation Arising From the Denial of Parole

In affirming the decision of the federal district court, the First Circuit concluded that the increased likelihood of being denied parole resulting from the refusal to enter the SOP does not amount to compulsion for Fifth Amendment purposes. This decision, which is grounded in sound legal reasoning, is in accord with controlling Supreme Court precedent and with the majority of decisions from lower federal and state courts. There is, thus, no reason for this Court to grant the Petition for Writ of Certiorari in order to review the First Circuit's sound decision. In *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998) the Supreme Court held that the Fifth Amendment was not violated when a death row inmate was faced with the choice between incriminating himself in a clemency interview or having adverse inferences drawn from his silence. *Id.* at 286. The Court held that the decision whether to speak at the clemency interview was not "compelled", despite the dire consequences

which could potentially flow from his refusal.

> "Assuming . . .that the Authority will draw adverse inferences from respondent's refusal to answer questions. . . we do not think that respondent's testimony at a clemency interview could be 'compelled' within the meaning of the Fifth Amendment . . . . He merely faces a choice quite similar to the sorts of choices that a criminal defendant must make in the course of criminal proceedings, none of which has ever been held to violate the Fifth Amendment."

Id. at 286.

The reasoning embodied in *Woodard* strongly supports the First Circuit's decision in this case. The Petitioners here are faced with a similar *voluntary* choice – either participate in a rehabilitation program (in which you may be required to give incriminating statements) or risk being denied parole.

The fact that Petitioners may be faced with a difficult choice between enrolling in the SOP or damaging their chances of getting parole does not mean that the choice is compelled. This Court has long held that the exercise of the Fifth Amendment privilege against self-incrimination does not have to be cost-free. *See, e.g., Jenkins v. Anderson*, 447 U.S. 231, 238 (1980) (criminal defendant's exercise of his Fifth Amendment privilege prior to arrest may be used to impeach his credibility at trial); *Baxter v. Palmigiano*, 425 U.S. 308 (1976) (Fifth Amendment does not prohibit state from drawing adverse inference from inmate's silence at disciplinary hearing); *Brady v. United States*, 397 U.S. 742, 751 (1970) (plea bargaining does not violate Fifth Amendment even though criminal defendant may feel

pressure to admit guilt in order to obtain more lenient punishment). The fact that the Petitioners may have to choose between a diminished likelihood of parole, or agreeing to make incriminating statements does not make the choice "illusory" or result in a violation of their Fifth Amendment rights.

Despite Petitioners claim to the contrary, other courts have not been "struggling" with the issues presented here. Every court which has been squarely presented with the issue has concluded that conditioning parole on completion of a sex offender treatment program does not violate inmates' Fifth Amendment Rights, even if the inmates are required to make incriminating statements in the program. *See*, *Johnson v. Baker*, 108 F.3d 10 (2nd Cir. 1997); *Doe v. Sauer*, 186 F. 3d 903 (8th Cir. 1999); *Russell v. Eaves*, 722 F.Supp. 558 (E.D. Mo. 1989); *Henderson v. State*, 543 So. 2d 344 (Fla. App.) *review denied*, 557 So. 2d 461 (1989).[4] Given the clear Supreme Court precedent which effectively decides the issue, and the fact that the lower courts have consistently decided the same issue in accord with the First Circuit's decision below, the Court should decline to grant the writ of certiorari in this case.

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[4] The cases in which sexual offender treatment programs have been invalidated on Fifth Amendment grounds generally concern situations in which inmates who had already been released on parole or probation were re-incarcerated as a result of their refusal to engage in sexual offender programming. *See, e.g., Mace v. Amestoy*, 765 F.Supp. 847, 850 (D.Vt. 1991); *State v. Imlay*, 813 F.2d 979, 985 (Mont. 1991). Those cases are distinguishable from the instant case. Once an inmate has been released on parole, he or she has a liberty interest in remaining free. The State's attempts to re-incarcerate an inmate who is at liberty would be subject to greater constitutional scrutiny than actions which limit an inmate's ability to obtain parole. *See, Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 9 (1979).

CONCLUSION

For the reasons stated above, Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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